Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

REPLY COMMENTS OF ALPHEUS COMMUNICATIONS, L.P.

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I. INTRODUCTION AND SUMMARY

USTA II does not require wholesale revision to the *TRO* as the RBOCs suggest. Rather the Commission should address the specific issues required by the D.C. Circuit. Any substantial departure from the findings in the *TRO*, other than to respond to the Court's *vacatur* in a narrowly tailored manner cannot be supported and would maximize the risk of reversal.

Unbundling of dark fiber is not only good policy it is good law. While the D.C. Circuit in *USTA I*, elaborated on the purported harms of unbundling, the Court observed that competitors use of UNEs stimulates the competition the Act was intended to foster, noting that "the more widespread the availability of elements that can be more efficiently provided by the incumbent . . . the quicker competitors will set about to provide the other elements and offering competitive service."[1] As Alpheus has explained, the widespread availability of dark fiber, and the Texas PUC's efforts to make access to dark fiber meaningful, allow Alpheus to "provide the other elements" such as optical multiplexing and other services derived from an all-optical network.

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[1] *USTA I* at 424.

Further, the Court's conclusion that "UNEs may enable a CLEC to enter the market gradually, building a customer base up to the level where its own investment would be profitable,"[2] is an apt description of how Alpheus has leveraged use of the ILECs unused dormant fiber to build up a customer base that now warrants investment in its own fiber facilities.

Similarly, continued unbundling of dark fiber is justified because the Supreme Court and D.C. Circuit both recognized that it makes sense to unbundle "facilities that are very expensive to duplicate (say, loop elements) in order to compete in other, more sensibly duplicable elements (say, digital switches or signal-multiplexing technology)."[3] Consistent with the expectations of the courts, Alpheus has done just that, using unbundled access to those elements that are "expensive to duplicate" and competing using "more sensibly duplicable elements" such as optical multiplexing.

Further, the D.C. Circuit held that the Commission may adopt a "relatively broad reading of the impairment standard" as long as unbundling is consistent with, or at least does not undermine, the other goals of the Act.[4] Because dark fiber unbundling is consistent with the Act's other goals—namely promoting facilities-based investment, the Commission should continue to apply a broad impairment standard for unbundling dark fiber.

As explained below the impairment inquiry should lead the Commission to conclude that:

> CLECs remain impaired without access to dedicated transport, using a three tiered approach to assessing impairment. While the RBOC proposals are largely inconsistent with evidence there is agreement that use of business line density in the wire centers ion each end of the route are a useful proxy for actual and potential deployment of transport

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2 *Id.*

3 *Verizon* at 510.

4 *USTA II* at 580 (fining broadband unbundling decisions justifiable in light of goals of the Act).

Business Line density in the wire center, however is not a useful measure of loop impairment because CLECs nationally face impediments to constructing dark fiber loops, particularly in obtaining building access

It makes no economic sense and would be inconsistent with USTA II for the Commission to apply its FTTH unbundling regime to legacy fiber

There is ample justification supporting a multi-year transition to allow CLECs to migrate from UNE dark fiber to their own fiber facilities;

Impairment for CLECs competing in the access market and CLECs competing in the local exchange market should be addressed together because the access market is not competitive

II. THE ALPHEUS IMPAIRMENT TEST FOR DARK FIBER CAREFULLY REFLECTS THE GUIDANCE OF THE COURTS WHILE PROMOTING FACILITIES BASED COMPETITION AND INVESTMENT

A. Alpheus' Standard is Responsive to the Guidance of the Courts.

Consistent with the direction of the Supreme Court, Alpheus' proposed impairment standard addresses the availability of dark fiber outside the ILEC network, including a competitor's ability to obtain a third party alternative or self-provision.[5] Importantly, Alpheus' evaluation of impairment for dedicated dark fiber transport is focused on "legacy" fiber facilities not "greenfield" fiber. The RBOCs meanwhile have misconstrued the relevant court decisions arguing that unbundling of dark fiber is not warranted anywhere.[6]

Alpheus' impairment test further recognizes the balance the D.C. Circuit requires the Commission to strike between the benefits unbundling brings to competition and the purported harms such as investments CLECs purportedly may forego when relying on UNEs.[7] This balance requires that the Commission make "some effort to make reasonable trade-offs" between the relevant costs and benefits in making unbundling determinations.[8]

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[5] *AT&T v. Iowa*, at 389-390.

[6] SBC Comments at p. 61.

[7] *See USTA I* at 424-425.

[8] *USTA I* at 425.

The transport impairment test Alpheus proposes herein adheres to the limits the D.C. Circuit imposed on such "reasonable trade-offs."[9] For example the transport unbundling analysis assesses impairment in "specific markets or market categories,"[10] namely geographic markets based on the business line density at each end of a transport route. By using the business line density of the ILEC wire center, the Commission's unbundling analysis will be "tracking market characteristics and capturing significant variation."[11] For instance, as described in more detail below, there is significant variation between routes where both pairs of ILEC central offices have more than 40,000 business lines and routes where the central offices have between 20,000-40,000 business lines. This "nuanced" dark fiber transport impairment analysis allows the Commission to identify those point-to-point transport routes where the benefits of unbundling dark fiber outweigh the purported costs of such unbundling.

Likewise the Alpheus impairment test appropriately considers the D.C. Circuit observation that "any cognizable competitive 'impairment' would necessarily be traceable to some kind of disparity in cost."[12] In particular, the D.C. Circuit requires the Commission focus its analysis on those elements "for which multiple, competitive supply is unsuitable."[13] As Alpheus explains, its impairment without access to dark fiber lies primarily in the significant disparity in costs CLECs face in serving customers when the ILEC has the use of a ratepayer-funded ubiquitous network. For elements such as fiber transmission facilities, multiple competitive supply is not possible when local governments and private property owners erect

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9 *Id.*

10 *USTA I* at 426.

11 *USTA II*, at 563.

12 *USTA I*, at 426.

13 *USTA I*, at 427.

virtually insurmountable barriers that prevent duplication of facilities already in the ground, especially where there is sufficient spare capacity to meet considerable present and future demand. In this case, the element may not be well suited "for multiple competitive supply."

B. Business Line Density Accurately Reflects Existing and Potential Competitive Deployment

While the RBOC comments present radical proposals for dismantling the Act's unbundling provisions, and would require reversing findings in the *TRO* upheld by the Court, the comments identify common ground between the impairment framework Alpheus proposed in its initial comments, and the RBOC proposals. For instance, the RBOCs admit that business line density at both ends of a transport route is a viable proxy for the existence of actual and potential competitive deployment on a transport route.[14] By using this proxy, the ILECs implicitly recognize that a route-by-route analysis of impairment is warranted. This route-specific approach is warranted, as Alpheus notes, particularly where markets do not show a pattern of existing competitive deployment and the cost disparities from one route to the next are significant. Nonetheless the RBOCs overreach by proposing that competitors are not impaired without access to UNE transport in wire centers with more than 5,000 business lines. Alpheus' detailed examination of Texas evidence demonstrates conclusively that the 5,000 business line threshold would not even justify the deployment of collocation, never mind transport.[15]

The ILECs meanwhile claim that the D.C. Circuit invalidated the *TRO*'s route specific review of loop and transport unbundling. However, the court simply asked that the Commission justify its decision to choose one market definition over another, which in no way indicts the

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[14] BellSouth Comments at 39-40; BellSouth Padgett Affid. ¶5; SBC Comments at p. 69-70

[15] Alpheus Reply Dec. ¶¶ 8-28.

trigger test.[16] Consistent with *USTA II*, the impairment test proposed herein is tethered to the natural monopoly characteristics of the market for dedicated transport, and other "structural impediments to competitive supply."[17] Whereas the Court did not hesitate to vacate those portions of the TRO with which it disagreed, the Court found "no statutory offense" with the Commission's approach to impairment in the *TRO* including its examination of the barriers to entry.[18] Thus, the Court established that the Commission's impairment framework was a reasonable interpretation of the statute provided it addressed the one point where the Court found the standard vague.[19] Both ILEC and CLEC comments addressed this issue in their initial comments and proposed that the Commission clarify that the impairment standard examines "whether the enumerated operational and entry barriers 'make entry into a market uneconomic,'"[20] for a reasonably efficient carrier.[21]

On remand, the Commission should continue to apply this affirmed standard using the framework set forth in Alpheus' initial comments,[22] and find that competitive entry into the dedicated transport market by a reasonably efficient CLEC is economic 1) on transport routes where both wire centers on each end of the route serve more than 40,000 business lines; [23] and 2) find that entry is not economic on transport routes where there are between 20,000-40,000

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[16] *USTA II* at 574-575.

[17] *See USTA II* at 572-73.

[18] *Id.* at 572.

[19] *See USTA II* at 572.

[20] *Id.* at 572, *citing TRO* at 84.

[21] Alpheus Comments at pp. 79-81; Loop & Transport CLEC Comments at p. 28. *See also* SBC comments at p. 29.

[22] Alpheus Comments at p. 18-27.

[23] Alpheus Reply Dec. ¶¶ 18-20. As explained in Alpheus' initial comments these thresholds were derived using data developed by PNR Associates for the Commission's use in the non-rural high-cost universal service proceeding.

business lines served by the ILEC wire center on either end of the transport route. For routes in this second tier, the evidence suggests that a finding of impairment is warranted even without the application of any triggers.[24] While there is evidence of competitive deployment on some routes between wire centers that have between 20,000-40,000 business lines, they are far more the exception rather than the rule.[25] However, routes in this range typically possess diverse characteristics that make any level of generalization among the routes imprecise.[26] Where broad geographic generalizations are not warranted, the Commission should apply the self-deployment and wholesale triggers the Commission adopted in the *TRO*. Finally, the Commission should find that entry is not economic on transport routes where there are less than 20,000 business lines served out of the ILEC wire center on either end of the transport route.

Alpheus' review of the RBOC business line proposals in the context of the PNR Associates data used by ALTS and Alpheus, shows that the RBOC thresholds would be tantamount to no unbundling at all.

Alpheus analyzed central offices in Texas where, using the PNR data, there are between 10-20,000 business lines. These central offices are typically in small towns where competitors have not provisioned their own fiber, even in periods of rampant over-deployment and have no realistic plans of doing so anytime in the near future.[27] Further, many other wire centers in the 10-20,000 business line range are primarily residential central offices with little, if any, large businesses.[28] Finally, many of these businesses are in low-income residential and commercial

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[24] *cf. USTA II* at 574; *see also* Alpheus Reply Dec. ¶ 16-17.

[25] *See generally* QSI Report at 2-3; *see also* Alpheus Reply Dec. ¶ 16-17.

[26] Alpheus Reply Dec. ¶ 17.

[27] Alpheus Reply Dec. ¶ 15, 33.

[28] Alpheus Reply Dec. ¶ 15.

areas where there is virtually no competitive presence, and the revenues to justify new investment are not available.[29] These central offices, particularly in Texas markets, do not have the concentration of large business customers that the RBOCs recognize are a fairly reliable predictor of competitive deployment.[30] Where the customers are not concentrated it becomes far more difficult for CLECs to overcome the barriers to entry that make serving the market uneconomic.[31]

The ILECs suggest that use of the triggers is inappropriate because the purpose of the Commission's impairment analysis is not simply to measure where competitive facilities currently exist but rather that the Court requires the Commission to find that that no impairment exists where "competition is possible."[32] Alpheus' transport impairment test, with its wire center proxy tiers, more than meets the requirements of the Court to find a proxy for similarly situated costs, while limiting the application of the triggers to only one subset of routes.

Further, the "error costs" of the route specific review in this middle tier of wire centers are likely to be significantly lower than the error costs of a broader market definition.[33] A broader market definition within the second tier would likely incur significant false negatives (findings of no impairment where impairment actually exists) because the marketplace evidence generally shows impairment.[34] Indeed, given that the purpose of the Act is to foster competition, any risk of error (which will inevitably occur when using proxies)[35] should err in favor of more

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[29] Alpheus Reply Dec. ¶ 15.

[30] RBOC UNE Report 2004 at III-16.

[31] RBOC UNE Report 2004 at p. III-1; *See e.g.* BellSouth Padgett Affid. ¶ 21.

[32] *See* SBC Comments at 29-30; BellSouth Comments at 9-12; Verizon Comments at 12-14.

[33] *See USTA II* at 575.

[34] *See* QSI Report at 2-3.

[35] *See*.e.g. *USTA II* at570 (recognizing "inevitability of some over-and under –inclusiveness").

competition. This is especially true with dark fiber given the low administrative costs to the ILEC and the 100% incremental revenue the ILEC receives for use of dark fiber. Importantly, any false positives (impairment findings where no impairment finding is proper result) would be corrected through use of the triggers.

This mechanism is significantly preferable to the Commission finding "no impairment" and requiring reverse application of the triggers, as implicitly suggested by the RBOCs.[36] The results of the QSI Report show that there would be an extensive list of contested routes if the Commission reversed the burden on applying the triggers. To avoid administrative waste and reduce needless error costs, the Commission should continue to apply the *TRO* triggers as the exception to the general rule of impairment.

Further, because these unbundling rules do not apply to new ILEC investment, the cost of allowing unbundling is minimized. Verizon is wrong when it claims that false positives are more costly than false negatives.[37] As explained below, this does not apply to dark fiber. Dark fiber facilities are exclusively legacy monopoly facilities, and the "cost" of unbundling those facilities is relatively small because the prospect of sharing those facilities does not deter future ILEC investment.[38] In contrast however, the cost of false negatives for dark fiber is especially high because of the high entry barriers associated with self-deployment of fiber facilities and the absence of alternative sources of supply. Because lack of deployment severely curtails competitive facility-based providers' investment in other elements of the network, the false negatives impose higher costs than false positives in the case of dark fiber UNEs used to serve

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[36] *See* Qwest Comments at 14. (suggesting affirmative finding of impairment, not presumption, is needed before ordering unbundling).

[37] *See* Verizon Comments at 25-27.

[38] Because, as explained below, the ILECs have already built their interoffice fiber.

the enterprise market. Said another way, the extensive benefits of competition, with its concurrent low prices and high levels of innovation, should always outweigh the risk of *de minimis* administrative costs.

While the RBOCs agree with using business lines per wire center as a proxy for actual and competitive deployment of DS1 transport, they refuse to provide such data to CLECs for joint analysis. While Alpheus supports the ALTS request for the confidential wire center data used by the Universal Service Administration Company ("USAC") as a common sense approach, use of the current protective order governing this proceeding would allow for joint review of the ILEC figures.[39] CLEC and ILECs to date have vigorously enforced the limitation of the protective order by challenging the right of persons engaged in competitive business decisions to access confidential materials.[40] The Commission should expect similar vigilance to the extent it affords CLEC attorneys the ability to review the same access line data on which the ILEC proposals are based. If the RBOC proposals rely on other sources of data, whether or not deemed reliable, the RBOCs should identify the source of that data and provide CLECs access. As Alpheus and other CLECs stated in proposing impairment tests using the PNR access line data, the thresholds proposed are based only on the data in the PNR report. While Alpheus would prefer the Commission use the data as it has proposed, Alpheus would require time to evaluate any other data against its knowledge of its specific markets and where competitors have or have not deployed alternative facilities to ensure a basic level of data integrity.

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[39] *See Protective Order* at ¶ 5.

[40] *See* Letter from J. C. Rozendaal, Counsel for Verizon, filed Oct. 14, 2004; Letter from T. Kingsley, BellSouth to Jeffrey J. Carlisle, October 4, 2004.

C. The Commission Must Foster a Competitive Wholesale Transport Market to Keep Retail Competition and Enable New Last Mile Technology

Where the Commission finds CLECs are no longer impaired without dedicated transport, the Commission should ensure that wholesale transport providers can continue to serve CLEC customers. It is a virtual truism that there can be no competitive retail market if there is no competitive wholesale market.

One of the most significant attacks on a wholesale market made by Verizon is the contention that CLECs should not be allowed to connect their own fiber transport facilities to UNE loops. The Commission should give no credit to the argument that use restrictions are warranted where CLECs connect UNEs to their own facilities. Such a radical departure from the Commission's legally sustained combination rules would severely undermine facilities based competition and be reversed on appeal.[41]

Arbitrary use restrictions on stand-alone UNEs would discourage investment in competitive facilities. Where Alpheus constructs its own fiber transport ring, there is no legal basis for suggesting that it cannot combine that ring with a UNE loop to provide service to another CLEC for whom Alpheus provides dedicated transport. The Commission's rules and the Act clearly allow such combination.[42] Even if it were legal it would make no policy sense. What incentive then would Alpheus have to construct alternative transport facilities if its only option for connecting to end user buildings was ILEC special access or building its own loops? Thus the Commission should reject Verizon's attack on the wholesale market.

Finally, a thriving wholesale market is crucial not only for the current retail market to be competitive; a thriving wholesale market is also a prerequisite for future intermodal retail

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[41] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 483 U.S. 29, 43 (1983).

[42] 47 U.S.C. § 251(c)(3); 47 C.F.R. § 51.315(d).

competition. If Broadband over Power Line and Wi-Max are to truly go from being last mile technologies to being competitive last mile substitutes, these alternative providers will need non-ILEC wholesale suppliers to move their metro data. Often these providers are focused on the last mile technology and have not focused on carrying the traffic from the local node to their POP. If, as is often the case with today's CLECs, they are forced to rely on the ILEC's lit network to compete with the ILEC itself, they will fall prey to the same anti-competitive forces that the ILECs have brought to bear on the start-up CLECs. Competitors to the ILEC, including providers of these new technologies, must have the option of an independent wholesale market for transport, such as Alpheus. Otherwise, they will be forced to use the ILEC which has every incentive to ensure they do not prosper. Of course, this will benefit the ILEC, to the detriment of the new providers, the consumers, and the future of the technologies themselves.

III. A LOCATION SPECIFIC DARK FIBER LOOP IMPAIRMENT ANALYSIS PROPERLY TRACKS *USTA II*

Competitor comments agree that loops generally are the most difficult element in the ILEC network to duplicate.[43] There is also broad consensus that the Commission must analyze impairment of dark fiber loops on a granular basis building by building.[44] Because of the wide disparity in the availability of economic and timely building access from location to location, the error costs of a broader geographic analysis of dark fiber loop impairment would undermine the Act's twin goals of fostering competition and promoting facilities based investment. Despite the RBOCs claims that the Commission cannot analyze building access restrictions as part of its impairment analysis, the D.C. Circuit endorsed the Commission's consideration of such

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[43] MCI comments at p. 130.

[44] ALTS comments at p. 70.

impediments, in the *TRO*, and the Commission should not deviate from that approach.[45] Indeed, any substantive deviation invites the risk of reversal.

The ILECs have aggressively construed the controlling precedent far more narrowly then those decisions permit for the loop unbundling analysis. For instance the ILECs suggest that the Commission is precluded from adopting presumptions in favor of unbundling a particular UNE that may be rebutted through application of the triggers.[46] The Court, however, made no such finding. Rather, the D.C. Circuit held that national presumption is not justified when the Commission's method of rebutting the presumption is unlawful.[47]

A. In the Loop Impairment Analysis *USTA II* Allowed the Commission to Consider Lack of Reasonable and Timely Building Access as a Structural Impediment to Competitive Entry

In the *TRO,* the Commission identified "the inability to obtain reasonable and timely access to the customer's premises" as a barrier to competitive loop deployment that CLECs must overcome.[48] The Commission should reiterate this finding and reject the ILEC claims that the building access issues are an improper consideration in an impairment analysis and the ILECs face the same impediments to deploying fiber loops. Indeed, the record is clear that the many advantages the ILECs enjoy as a perceived utility are insurmountable barriers for CLECs.[49]

As discussed above, the D.C. Circuit, at a minimum, has implicitly affirmed the Commission's incorporation of building access impediments into the impairment standard. The

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[45] *See USTA II* at 571-572 (finding the Commission's impairment standard in the *TRO* "plausibly connects" the factors it considers to "natural monopoly characteristics," and "structural impediments to competitive supply" including "sunk costs," and "first mover advantages.")

[46] SBC Comment at p. 30.

[47] *USTA II*, at 570-571 (discussing mass market switching).

[48] *TRO* ¶ 312.

[49] Alpheus Reply Dec. ¶¶ 36-45.

Court tacitly approved the Commission's findings regarding "structural impediments" to competitive deployment and found that the Commission's impairment standard "plausibly connected the factors to consider" in the impairment inquiry to "natural monopoly characteristics and "structural impediments to competitive supply," such as "first mover advantages."[50] Contrary to the ILEC assertions, the Court did not permit the Commission to ignore entry barriers that the Commission could address at some later juncture with specific regulations targeted at that barrier. Rather, the Court held that, where the Commission can narrowly describe the entry barriers, the Commission must likewise narrowly tailor the relevant unbundling requirements to address the impairment.[51]

The ILECs retain significant first-mover advantage with respect to building access that is a vestige of their recent standing as a state-sanctioned monopoly. Because the monopolist ILECs served all customers, they were treated as utilities, and are still treated as such in most places.[52] This means that when new office buildings are constructed, building owners allow the ILEC to wire the building for telecommunications services without a fee.[53] Thus ILECs have an absolute cost advantage for access to existing buildings because while the ILEC obtained free access to buildings, CLECs must pay, often significantly, for such access.[54] Even with respect to new buildings where the ILECs claim they are on equal footing with CLECs, the ILECs enjoy an absolute cost advantage. The advantages afforded ILECs are not a result of ILEC innovation or competitive ingenuity but are afforded as a vestige of their monopoly. Captive ratepayers paid

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[50] *USTA II*, at 571-572.

[51] *USTA II* at 570 (suggesting that the Commission could have factored ILECs hot-cut performance at high volumes into its impairment finding by retaining switching UNE where high volumes were likely, even though Commission could remedy hot cut issues through additional rules outside unbundling context.)

[52] Alpheus Reply Dec. ¶ 36.

[53] Alpheus Reply Dec. ¶ 37.

[54] Alpheus Dec. ¶ 46-47.

for virtually all of their assets; and using the ubiquitous network the ratepayers built, the ILECs know that as the "phone company" they will naturally inherit almost the entire market share in new buildings and greenfield developments.

B. Potential Deployment of Loops

The ILECs contend that CLECs are potentially able to construct new loop facilities in any area where another competitor has a fiber-based collocation. Only at customer locations where the credit worthy customer commits significant aggregation of traffic and revenue for a significant term would it ever be economic for Alpheus to deploy its own fiber loops.

The RBOCs however contend that CLECs could potentially deploy loops where CLECs have deployed dedicated transport facilities.[55] The *TRO*, however acknowledged that loops serve a single customer while transport routes allow CLECs to aggregate customer traffic on a single facility.[56]

Thus, It is highly probable that even in cases where a CLEC is found not impaired on a transport route, that it is completely impaired without a UNE loop from the same central office. Yet, in such a situation if the CLEC cannot access the loop, its customer either goes unserved or has to accept the ILEC service. In addition without the ability to serve customers using UNE loops from a central office where a CLEC would have to deploy its own transport the CLEC would be unlikely to make the investment to collocate and build its own transport if UNE loops were not available.

While the RBOCs incorrectly argue that CLECs "typically" deploy laterals to end user buildings where they have built fiber rings, the analysis to justify building laterals is of course

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[55] RBOC UNE Report at III-31.

[56] *TRO* ¶ 302-303, n. 884.

specific to a customer location. Evaluating the business case for extending a lateral requires an analysis of the revenues that can be obtained from the specific customer and location. Contrary to the claims of SBC and Verizon, CLECs cannot base deployment decisions on the entire telecom revenues at a building, (as an ILEC does) as the Commission has long recognized that the era of "build it and they will come" competitive fiber deployments are long dead. Build it and they will aggregate is no better. Alpheus can justify deploying greenfield fiber only with a long-term contract, with a single, credit worthy Fortune 500 type customer. A neighborhood of small businesses of various credit profiles and different contract terms will go unserved if UNE loops are unavailable at the wire center. Such a construct allows competition only to Fortune 500 level customers, to the detriment of small and medium-size businesses. Thus, such projects must be addressed on case-by-case granular basis, and only where building a lateral from a transport ring to an end user customer premises is economically justifiable.

There are other important obstacles that make constructing such laterals uneconomic. For example, where Alpheus obtains third party fiber via an IRU, Alpheus may not be able to construct a lateral because the cost of deploying Alpheus fiber from the customer to the lateral may render offering fiber-based service at that location cost-prohibitive.[57] Second, Alpheus may not be able to obtain building access to bring its fiber to the customer in the first place without incurring substantial additional costs that make service to the customer at that location uneconomic.[58] Thus the simple fact that Alpheus may be using non-ILEC facilities to provide transport into or out of a specific ILEC central office has absolutely no bearing on whether Alpheus is impaired without access to dark fiber loops at that same central office.

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[57] Alpheus Reply Dec. ¶ 42.

[58] *Id.*

C. The Commission Should Continue to Use Dark Fiber Loops as an Enabler for a Facilities-Based Progression Beyond "Lit" Loops

While the Commission and certain carriers claim that it is possible for CLECs to self deploy loops when demand reaches 3 or more DS3s, this generalization is inconsistent with the *TRO* and Alpheus' experience. As an initial matter the Commission's 2 DS3 loop limitation did not apply to dark fiber, because as discussed in more detail below, the Commission recognized the benefits of using UNE dark fiber, namely in using the presence of dark fiber to eliminate unbundling of "lit" loops. If the 2 DS3 limit were imported into the dark fiber analysis it would at a minimum undermine, if not eliminate the use of UNE dark fiber loops to provide wholesale alternatives to ILEC UNE DS3 loops. No reasonably efficient carrier would invest in collocation and deployment of optronics to light a dark fiber loop to provide wholesale service knowing that once it reaches 2 DS3s on the loop it would have to surrender the fiber facility.

Second, it is illogical to equate traffic alone with impairment because impairment must also consider the costs that present a barrier to entry.[59] As discussed above, because these costs vary significantly from building to building, the Commission cannot logically conclude that all carriers can self-deploy loop facilities when providing a certain level of traffic on the facility. Measuring DS3 traffic to assess impairment for loops arbitrarily ignores these variables.

Third, use of DS3 traffic as a proxy for impairment is predicated on inferences regarding deployment that simply are not reasonable. Merely because AT&T claims that it can economically deploy three DS3 loops to a customer does not require a finding that a reasonably efficient new entrant can do the same. AT&T's facilities were deployed under vastly different market conditions and would not be considered reasonably efficient by today's standards.

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[59] *USTA I* at 427-428.

Further AT&T and other *retail* carriers have different profit opportunities than wholesale carriers such as Alpheus that must provide wholesale services at level that permits its customer to make a profit in the retail market. Alpheus Reply Dec. ¶ 48.

Finally, carriers that provide lit services face different risks when they cross that illusory three DS3 threshold. While a CLEC using two DS3 loops can obtain the third loop at special access and seek volume and term discounts for such service, a CLEC using dark fiber has no tariffed alternative. Likewise, the CLEC using DS3 loops would have the opportunity to use wholesale DS3 loops from a carrier lighting UNE dark fiber such as Alpheus, whereas if Alpheus lost access to the dark fiber loop it has no wholesale alternative. When the CLEC using dark fiber has a customer that wants another DS3 (forcing the carrier to cross the 3 DS3 threshold) the only alternative (that avoid economic waste) is to self-deploy. Using special access creates inefficiency; because the dark fiber CLEC has placed multiplexing equipment that can provide many DS3s. To leave that capacity (of both the fiber and optronics) untapped creates economic waste as the investment does not fully utilize the investment. For these reasons the Commission should not graft the 2 DS3 limit on DS3 loops into the dark fiber loop rules.

IV. EXTENDING FIBER TO THE HOME RELIEF OUTSIDE THE RESIDENTIAL BROADBAND MARKET WOULD BE UNLAWFUL

The Commission should make clear that it will not abandon the principles of its unbundling rules that were sustained in court and reject the RBOC fiction that CLECs and ILECs stand on equal footing in competing for enterprise customers. Based on this fiction, the RBOCs propose that the Commission abandon the approach adopted in the *TRO* and essentially declare all unbundling off limits in the name of advancing hypothetical and often promised new investment by the ILECs. Such an approach is unlawful, first and foremost, because as demonstrated in Alpheus' initial comments and in the comments of other parties, CLECs remain

clearly impaired without access to dark fiber transport, loops and entrance facilities.[60] Second, even with complete unbundling relief, the ILECs would have no incentive to invest in facilities to serve enterprise customers because those investments are already made. ILECs made these investments well before the 1996 Act, and any investments made after 1996 were made *despite* the existence of "maximum unbundling" that the ILECs have opposed with such vitriol. Verizon's assertion that "there is no reason to treat the enterprise market differently," is wrong.[61] Indeed, Verizon and other ILECs have deployed fiber to provide enterprise services for decades, long before the 1996 Act, and are not providing "new" broadband services, because enterprise customers have had broadband service for as long as ILECs have deployed fiber optic cable.

Similarly, should the Commission adopt an impairment test for UNE dark fiber transport that eliminates most, if not all, central office routes, it is clear that many suburban and low income parts of town would no longer receive the benefits of competition. Alpheus, which is collocated in 85% of the central offices in its cities, serves these levels of markets now, based on the aggregation technique of using UNE dark fiber transport. Alpheus' presence, in turn, allows competitive broadband services to be sold to these diverse markets. Should CLECs, such as Alpheus, lose the ability to serve these marginal central offices with UNE dark fiber transport, it is clear that the customers would be limited to ILEC product offerings and high prices and lose the benefits of competition.

Consistent with the policy objectives and the legal guidance from the courts, Alpheus initial comments has proposed an impairment framework for dark fiber transport and loops that achieves a balance between promoting competition using UNEs and fostering additional

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[60] Alpheus Comments at pp. 2-3, Loop and Transport Coalition Comments at pp. 79-82; ALTS Comments at p. 4.

[61] Verizon Comments at p. 144.

investment where competitive entry has already occurred and is possible without UNEs. After reviewing the comments filed in this proceeding:

Alpheus transport impairment test, using business lines as a proxy for actual and potential deployment, is consistent with the command of the court

A. Future Investment Decisions Have Nothing to Do With Unbundling Rules for Legacy Fiber

Despite RBOC claims to the contrary,[62] the RBOCs deployed the vast majority of their interoffice fiber transport facilities *before* the 1996 Act.[63] RBOCs such as SBC have deployed fiber in their network at least as early as the 1980s.[64] Despite SBC's claims, the reality in the ground shows otherwise. As recounted in the attached Reply Declaration, Alpheus has firsthand knowledge that the fiber in SBC's interoffice network is far older than SBC claims in this proceeding. For example, when Alpheus was deploying its multiplexing and DWDM equipment to "light" its Houston area network using SBC dark fiber, Alpheus encountered serious problems with signal loss that interfered with the functioning of its DWDM equipment.[65] During the time spent working with SBC to resolve the problems, it became obvious to Alpheus that much of the fiber in SBC's network was deployed in the 1980s.[66] Fiber deployed after the 1996 Act, as SBC claims, would not have had the same problems with dB loss and other signal problems, nor would the fiber jumpers have been so old.[67]

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[62] SBC Comments at p. 74.

[63] Alpheus Reply Dec. ¶ 49.

[64] Alpheus Reply Dec. ¶ 44-45, 49.

[65] Alpheus Dec. ¶ 21.

[66] *See* Alpheus Dec. ¶ 21.

[67] *See* Alpheus Dec. ¶ 21.

Even if the Commission were to credit the RBOCs' claims regarding when the fiber was actually deployed, such claims would be of no consequence, as the vast amount of fiber transport facilities in the ground demonstrate unequivocally, that the RBOCs need no additional incentive to deploy interoffice fiber facilities.[68] The ILECs cannot seriously contend that there is a need for policies to encourage additional fiber deployment, particularly for fiber used to provide dedicated interoffice transport. ILECs already have deployed vast quantities of fiber in their interoffice networks.[69] On most interoffice routes in Texas, for example, SBC has literally hundreds of spare legacy fiber strands available and the vast majority of the fiber in their interoffice network remains dormant.[70]

Finally, the Commission should consider that eliminating unbundling of fiber to serve enterprise customers would deter investment by competitors. Without access to critical last mile facilities, CLECs would likely exit the market in droves, most likely starving for cash and capital as investors flee the market. For example, Alpheus would have little incentive to deploy new equipment and fiber facilities if the Commission eliminated its ability to obtain UNEs. Alpheus certainly could not extend its network to new markets that it currently does not serve.

Because eliminating the availability of UNE dark fiber in the enterprise customer market will not promote new investment, *USTA II* cautions the Commission against adopting the policy the RBOCs now propose. While *USTA II* may be read to have affirmed the Commission's ability to use § 706 considerations to override clear findings of impairment, it cannot be squared with the proposal offered here where the record shows that the Commission's adoption of such a

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[68] See Alpheus Reply Dec. ¶ 6.

[69] Alpheus Reply Dec. ¶ 49.

[70] Alpheus Reply Dec. ¶ 6.

proposal would not result in the purported benefit; but shows that it would actually have the opposite effect.

USTA II further suggests that eliminating access to UNE dark fiber without "specific evidence" suggesting the unbundling would deter additional investments of the type the ILEC already make are of dubious legal merit.[71] Moreover the additional factors of the Commission's FTTH unbundling determinations that apparently persuaded the Court to affirm the Commission's FTTH unbundling rules adopted in the *TRO* are absent in this instance. As a general matter, the Commission rationalized its no impairment finding for broadband loops as a way to stimulate the deployment of new services, not just new facilities that deliver the same services currently in use today.[72] With respect to the specific criteria onto which the Court hitched its analysis, there is nothing comparable to the "additional electronic equipment" the ILECs supposedly needed as an incentive to deploy to provide residential broadband.[73] There is no contention by the RBOCs themselves that they require additional incentives to deploy new and efficient technology, as the technology to provide high capacity services to enterprise customers is already widely deployed and exists today.[74]

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[71] *See e.g. USTA II* at 581 (suggesting that absent other considerations the investment incentive policy was not supported by the Act when the ILECs are already making the investments the Commission intends to incent).

[72] *See TRO* ¶ 272; *USTA II* at 580-81.

[73] *See Id.*

[74] Alpheus Reply Dec. ¶ 49.

B. ILECs With Ubiquitous Ratepayer Funded Networks Do Not Face the Same Operational Barriers as Startup CLECs

The ILECs further suggest that the Commission can eliminate access to unbundled dark fiber in the enterprise market because CLECs and ILECs are on equal footing when deploying such fiber. Then the ILECs assert that any such differences, because they are not of the ILECs own making, are of no consequence to the Commission's impairment analysis. On both points the ILECs are wrong.

Unlike CLECs, ILECs can tap into a largely captive base of ratepayer revenues to fund substantial new investments in fiber facilities. This difference is crucial; it pits guaranteed monopoly cash flows against at risk capital. Alpheus' Texas experience confirms that SBC uses its legacy monopoly status in just this fashion.[75]

The ILECs retain advantages accessing their own conduit and obtaining and using municipal rights-of-way.[76]

While the RBOCs are correct in acknowledging that access to ILEC duct, poles and ROW is available to competitors, their insistence that such access is "easy" is inconsistent with Alpheus' experience using SBC duct in Texas. Rather, Alpheus' experience is that ILEC records available to CLECs are not accessible in a centralized location, instead requiring significant travel time simply to locate the records before the CLEC can locate the duct.[77] Indeed, these records can be decades out of date, and do not show abandoned cable or blocked duct that the

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[75] Alpheus Dec. ¶ 48-50.

[76] The ILEC also retains other advantages such as preferred access to commercial buildings, Alpheus Dec. ¶ 51-52; *see also Complaint of Time Warner Telecom against Tanglewood Property Management,* Tex PUC, Docket 24604, Final Order Feb. 19, 2004, (Texas PUC held that if ILEC obtained access for free as a monopoly it was not discrimination for a building owner to charge CLEC an exorbitant rent for the same access afforded to the ILEC for free), and the ability to obtain easements from private property owners. Alpheus Dec. ¶ 109 (carrier of last resort has ability to obtain easements and use eminent domain).

[77] Alpheus Dec. ¶¶ 65-71.

ILEC typically has knowledge of because it is their own copper cables that it has abandoned.[78] Meanwhile SBC employees have computerized access to digitized records of underground facilities.[79] Further, the ILEC enjoys advantages in accessing the duct. Its employees can access the duct at any time, while CLECs require permission ILECs also retain immediate use of maintenance ducts that other carriers utilizing SBC ducts do not. This, for example, affords SBC the ability to pull fiber through the maintenance duct, which is always secure and available because of its maintenance status. Additionally, the ILEC leaves the maintenance duct roped and ready its emergency use in case the ILEC needs to replace quickly damaged cable.[80] Because the ILEC controls the asset, information, and records regarding the asset, it is incorrect to say that ILECs and CLECs stand on an equal footing regarding use of ILEC duct.

Similar disparities also exist in the construction process as well. CLECs typically face more stringent municipal restrictions regarding construction in the public rights-of-way. Most municipalities tend to limit the hours during which CLECs may construct. For example, in Houston because SBC is the carrier of last resort, its construction crews can operate in the daytime which afford SBC significant cost savings; CLECs meanwhile must typically perform construction activities overnight, which is more difficult and requires much higher labor charges.[81]

Because the ILEC has more fiber deployed then it could ever use, any unbundling analysis colored by an intent to promote additional ILEC fiber investment would be irrational, arbitrary, and unreasonable.

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[78] Alpheus Dec. ¶ 67-68.

[79] Alpheus Dec. ¶ 67-68, 71.

[80] Alpheus Reply Dec. ¶ 43.

[81] Alpheus Reply Dec. ¶ 13.